IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.

**ARBITRATION PETITION NO.417 OF 2006**

Shree Sai Enterprises, Petitioner
vs.
1. Mahanagar Telephone Nigam Ltd.

2. The Ld.Sole Arbitrator,
Shri Sanjeev V. Joshi Respondents

Mr.R.B.Modi, Constituted Attorney of Petitioner in person.

Mr.Saeed Akhtar for the respondents.

**ALONG WITH**
**ARBITRATION PETITION NO.433 OF 2006**

MTNL (Mahanagar Telephone Nigam Ltd.) Petitioners
vs.
Shree Sai Enterprises Respondent

Mr.Saeed Akhtar for the petitioners.

Mr.R.B.Modi, Constituted Attorney respondent in person.

**CORAM : ANOOP V. MOHTA,J.**

**DATED : 21st April, 2007**

**ORAL JUDGMENT:**

By these petitions both the parties have challenged the second award dated 29.07.2006 passed by the sole Arbitrator Shri S.V. Joshi between the parties arising out of the same contract.

2. As disputes arose in reference to construction of underground cable duct at Rabale-Thane-Cherai (I)/NB-01/1203/08/08.11.1996, the matter was referred to an Arbitrator one Shri D.N.Joshi. By an award dated 21.07.2002, after considering the rival contentions and material placed on record by the parties, out of total claims, the Arbitrator had awarded the following claims:

| S.No. | Claim for | Amount claimed | Amount awarded |
|---|---|---|---|
| 1. | Amount towards final bill<br>- Details as above. | 2,47,458 | 2,47,300.00 |
| 2. | Payment for threaded sockets - claim on the basis of alleged payments to other contractors not acceptable. | 4,128.00 | Nil |
| 3. | Refund for works Contract tax<br>- Respondents have not made any payments on behalf of the claimants. | 26,853.00 | 26,853.00 |
| 4. | With held amount for not submitting labour licence.<br>- No payments made by Respondents. | 10,000.00 | 10,000.00 |
| 5. | Interest for reduced payment at part rate - Not justified. | 15,621.00 | Nil |
| 6. | Interest on S.D.<br>- Not justified | 17,159.00 | Nil |
| 7. | Security Deposit<br>- Claim for refund of | 2,85.980.00 | 2,85,980.00 |

security deposit is justified.

| | | |
|---|---|---|
| 8. Interest on final bill - Not justified | 14,848.00 | Nil |
| 9. Escalation based on average indices | 6,88,770.00 | Nil |
| - The contract has no provision for payment of escalation and details of increase claimed on ad hoc basis. Not justified. | | |
| 10. Payment for renewal of bank guarantee. - Not justified. | 6,000.00 | Nil |
| 11. Compensation at 3% on the cost of an account of idle overheads etc. | 15,82,339.00 | Nil |
| - Not justified. | | |
| Additional claims no.12 to 15 made by the claimants are for interest and are not justified. | | Nil |
| Prayers a to d made by the claimants in their claim statement (page 76 and 77) seek declaratory award and are rejected. | | |
| No amounts are awarded in response to prayers e to h. | | |

| | |
|---|---|
| Total Award | Rs.5,70,133.00 |

Counter claims of Respondent (referred on 3.6.02

| S.No. Claim for | Amount claimed | Amt.awarded |
|---|---|---|
| 1. Work done at Claimants risk and cost | 24,219.00 | 10,314.00 |
| - Portion of cost for carrying out test only justified. | | |
| 2. Payment R.I. Charges to NMMC to repair damaged | | |

| | | |
|---|---|---|
| duct. | 43,125.00 | Nil |
| - Claim not justified and established. | | |
| Total award for counter claim : | | Rs.10,314.00 |

Net amount to be paid by the Respondents to the claimants is (Rs.5,70,133- Rs.10,314.00) Rs.5,59,819.00 Costs of Arbitration are awarded to the claimants at Rs.30,000/- making the total amount of award as Rs.5,89,819.00."

2. The Arbitrator has also rejected the counter claim filed by the Mahanagar Telephone Nigam Limited (for short, "MTNL") in Arbitration Petition No.417/2006 and the petitioner in Arbitration Petition No.433/2006. The petitioner in Arbitration Petition No.417/2006 who is respondent in Arbitration Petition No.433/2006 is the contractor in question (for short, "the Contractor") who, being aggrieved by the same has challenged the award by Arbitration Petition No.205/2003. MTNL admittedly made no challenge to the first award (for short, "the first award"). This Court, after considering the rival contentions and submissions raised by the parties as challenge was restricted to two items viz. (i) award of Rs.10,314/- to the respondents against counter claim made by the respondents and (ii) rejection of the claim of the petitioners for compensation at 3% of the cost on account of idle overheads, allowed the petition of the contractor, in the following words:

". In the result, petition succeeds in part, the award impugned in the petition to the extent of awarding Rs.10,314/- in favour of the Respondents and rejecting the claim of the Petitioners for compensation at the rate of 3% of the cost on account of idle machinery etc. is set aside. The award is modified to the extent above. Petition is disposed off. The Respondents are directed to pay cost of this petition to the Petitioners as incurred by the Petitioners."

3. MTNL in view of this appointed one Shri S.V.Joshi (second Arbitrator) to decide, make & modify the award as shown in the statement enclosed subject to admissibility under Clause 25 of the agreement with a condition that the Arbitrator should give reasons for the award.

4. The agreed terms of reference/claims were as under:

| Sr. No. | Brief Details of claims | Amount | Remarks |
|---|---|---|---|
| 1. | Whether the claimant is entitled to receive compensation at 3% of the cost on account of idle overheads etc. | Rs.15,82,339/- | Arbitrator to decide whether claim is justified and to what extent. |

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5. The matter was need to be reheard on the point of reference only. However, by an impugned award dated 29.7.2006 the Second Arbitrator has exceeded its jurisdiction and awarded various claims as agitated by the contractor and as referred in the first award. The

law is settled that Arbitrator cannot go beyond the point of reference. In the present case, admittedly, the point of reference was well within the knowledge of the parties and in fact parties have acted upon and proceeded accordingly. The second Arbitrator, therefore, as there was no consent given by the MTNL to allow the contractor to raise all other points, could not have answered or agitated or allowed to agitate other points/other claims.

6. In view of this settled principle, I am not inclined to entertain the submission of the Constituted Attorney of the contractor who is appearing in person that by the impugned order dated 20.1.2005 in Arbitration Petition No.205/2003 passed by this Court, all the points have been kept open or permitted to reagitate. There is nothing of that sort mentioned in the said order. The parties themselves have in fact proceeded initially on the basis of points of reference as referred above. The submission therefore of the learned counsel for MTNL is correct. I am acceding to the same. Therefore, the claim as awarded in the Second Award by the Second Arbitrator i.e. claim No.(I), Claim No.(II), Claim No.(III), Claim Nos. (III)(a to (d), Claim No. (IV), Claim No.(V) in party, Claim No.(VII) and Claim No.(VIII) are rejected as the same are beyond the scope and power of the Arbitrator to proceed with.

7. There is no dispute that all these items as claimed and decided by the first Arbitrator, were subject matter of the Arbitration Petition No.205/2003. There is no question of re-agitating the same issue even on facts as well as on law of resjudicata as submitted by the learned counsel for the MTNL.

8. The Apex Court has time and again reiterated the power and scope of the Arbitrator. The Supreme Court has reiterated that the Arbitrator cannot enlarge the scope of the reference. In the present case, the point of reference was never agreed to be enlarged by the parties. The Arbitrator therefore should not have gone beyond the point of reference. **(AIR 1977 SC 2014-Orissa Mining Corporation Ltd. vs. M/s.Prannath Vishwanath Rawley and AIR 1996 SC 2965-Union of India vs. M/s.G.S.Atwal & Company ).** The parties were fully aware of the scope of controversy in view of the reference. Therefore, the Arbitrator has determined the issues which were beyond the scope of the reference to the arbitration. The Supreme Court in **McDERMOTT INTERNATIONAL INC. vs. BURN STANDARD CO.LTD. & ORS., (2006) 11 SCC 181 in para 59 and in CENTROTRADE MINERALS & METALS INC. vs. HINDUSTAN COPPER LTD., (2006) 11 SCC 245 in para 103** observed as under:

> "103. ..... Where the arbitrator, however, has gone contrary to or beyond the expressed law of the contract or granted relief in the matter not in dispute would come within the purview of Section 34 of the Act."

The Supreme Court in **MD.Army Welfare Housing Organisation vs. Sumangal Services (P) Ltd., (2004) 9 SCC 619,** in paragraphs 72, 73 and 74 observed as under:

> "72. This Court cannot sit in appeal over the award of the arbitrator but can certainly interfere when the award suffers from non-application of mind or when a relevant fact is ignored or an irrelevant fact not germane for deciding the dispute is taken into consideration.
>
> 73. Where an order has been passed without jurisdiction, the principles of estoppel, waiver and acquiescence will have no application. There is no estoppel against a statute.
>
> 74. The award, therefore, suffers from legal misconduct on the part of the arbitrators."

9. In view of this, I am inclined to modify the award. All the claims as awarded by the Second Arbitrator are quashed and set aside except the award on the point of reference.

10. In so far as the point of reference is concerned, the Arbitrator has considered the rival submissions made by the parties and by giving following reasons granted a total amount of Rs.2,46,150/- towards this claim i.e. idle machinery and idle overheads.

**"Arguments for idle overheads and idle machinery:**

. The claimant contractor claims Rs.9 lakhs for the extended period of 36 months after the stipulated date of completion was over. This Rs.9 lakhs is claimed under the title as office establishment expenses, office staff salary, telephone, electric bills, transport expenses, site office with chowkidar and rent of the place, supervisor, engineers and movement from office to site. This claim also includes idle machinery cost of compressor with double barrel gun with operator and helper, concrete mixture with operator 2 dewatering pumps and a vibrator brought on the site for 7 times additionally and were send back without doing work because of non availability of site. The Respondent had not objected in the High Court as well as in this proceeding for this.

**Finding** : Partly justified.

**Reasons:- (A) For IDLE MACHINERY**

. Though the Claimant has raised the claim for 36 months considering the actual working time, period of fair working season, mitigation of losses the maximum period of claims cannot be more than two months ie. 60 days.

. The Transportation of machinery required is to be taken as approximately 6 times.

Rental for the idle machinery is considered as follows:

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|---|---|
| (i) Compressor with double barrel gun, operator and helper | Rs.450/- per day |
| (ii) Concrete mixture with operator- Rs.250/- per day | |
| (iii) Dewatering pumps 2 Nos. @ Rs.50/- per No./per day. | Rs.100/- per day |
| (iv) Vibrator 2 Nos. @ Rs.25/- per No./Per day. | Rs.50/- per day |
| Total per day : | Rs.850/- per day |

Transportation of these rental machinery from the place of its original to work place Rs.800/- per trip.

Therefore the total amount works out to be Rs.850/- per day x 60 days. Rs. 51,000/-

| | |
|---|---|
| Transportation Rs.800/- x 6 times. | Rs. 4,800/- |
| | --- |
| Therefore the Award Sum | Rs.55,800/-. |

**(B) Idle Over Heads:**

. The idle overheads for site office and land on rent for keeping material and machines are considered as follows for 27 months.

. 2 watchmen for day night for security of pipes, cement, steel, spacers, idle machinery for total extended period of 27 months ie. beyond 8/2/98 (on page No.11).

2 watchmen salary Rs.3500 per month totally

Land site Rs.1000 per month,

Part time Supervisor -Nil in view of principle of mitigation of losses.

Totally Rs.3500 per month.

**Findings:** Partly justified.

Rs.4500 per month x 27 months= 1,21,500/-

**Therefore the Award sum: Rs.1,21,500/-.**

**Therefore Total Award Sum for claim No.VI-**

**= 68,850 + 55.800 + 1,21,500 = Rs.2,46,150/-."**

11. After hearing both the parties, I am also of the view that the amount so awarded by the Second Arbitrator is just, proper and reasonable. Considering the facts and circumstances of the case, the reasoning as given cannot be said to be perverse or bad in law. The Award, therefore, sofar as the points of reference is concerned need to be maintained. The amount as awarded therefore need no interference.

12. The learned counsel appearing for the MTNL submitted that in fact they have raised various challenges and even claim damages against the contractor. Admittedly they had not challenged the first award. The submission in respect of other claims as granted second time by second Arbitrator are beyond the jurisdiction and scope of the reference is accepted. The restricted challenge made on that count by the MTNL is well founded. The counter claim of the MTNL in this background is rejected.

13. The Arbitrator, after considering the submission as raised by the contractor based on various judgments cited by the contractor granted simple interest in the following terms. The interest as awarded is reasonable and fair.

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. b) Simple interest of 8% P.A. is allowed in favour of Claimant on the amount awarded for claim (No. III c, IV, VII and VI) with effect from 21.09.2002 (from the date of the award by the previous Arbitrator upto the date of making and publishing the award as on today dt.29.07.2006.

. Respondents shall pay sum of award as above to the Claimant within the period of 30 days with 8% interest P.A. till the realization of payment failing which 12% per annum interest (simple) is allowed on the sum awarded with effect from date of making and publishing the award till the date of realization of payment."

14. It is made clear that in view of the other reasoning, the contractor is entitled to claim interest

as ordered above only on the idle overheads and idle machinery as awarded. The award of interest is restricted and granted accordingly. The contractor is not entitled for any interest on other claims.

15. The impugned award is modified accordingly to the above extent. Both the petitions are disposed of accordingly. There shall be no order as to costs.

. C.C. expedited.

[ANOOP V. MOHTA,J.]